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No. 00-1189

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

W. FOX MCKEITHEN, *et al.*,
Petitioners,

v.

UNITED STATES FIDELITY & GUARANTY CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals, applying the *ad hoc* fact-intensive analysis required by the Takings Clause, correctly determined that La. Rev. Stat. §§ 23:1371-1378 (1995), insofar as applied retroactively to the plaintiff insurers only, effected an unconstitutional taking of property without just compensation.

RULE 29.6 STATEMENT

1. Respondents Fidelity and Guaranty Insurance Company and Fidelity and Guaranty Insurance Underwriters, Inc. are wholly-owned subsidiaries of respondent United States Fidelity and Guaranty Company, which is, in turn, a wholly-owned subsidiary whose ultimate parent company is The St. Paul Companies, Inc., a publicly-traded company.

2. Respondents Argonaut Midwest Insurance Company and Argonaut Southwest Insurance Company are wholly-owned subsidiaries of respondent Argonaut Insurance Company, which is, in turn, a wholly-owned subsidiary of Argonaut Group, Inc., a publicly-traded company.

3. Respondents Commercial Union Insurance Company, American Central Insurance Company, American Employers' Insurance Company, The Employers' Fire Insurance Company and The Northern Assurance Company of America are wholly-owned subsidiaries whose ultimate parent company is CGU plc, a publicly-traded company.

4. Respondents The United States Fire Insurance Company and The North River Insurance Company are wholly-owned subsidiaries of Crum & Forster Holdings, Inc., a wholly-owned subsidiary whose ultimate parent company is Fairfax Financial Holdings, Ltd., a Canadian corporation.

5. Respondents Insurance Company of North America, Banker's Standard Insurance Company, Century Indemnity Company, CIGNA Fire Underwriters Insurance Company, CIGNA Indemnity Insurance Company, CIGNA Insurance Company, CIGNA Property and Casualty Insurance Company, CIGNA Specialty Insurance Company, Indemnity Insurance Company of North America and Pacific Employers Insurance Company are wholly-owned subsidiaries whose ultimate parent company is ACE Limited.

6. Respondents Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of the Southeast, Hartford Underwriters Insurance Company and Twin City Fire Insurance Company are wholly-owned subsidiaries whose ultimate parent company is The Hartford Financial Services Group, Inc., a publicly-traded company.

7. Respondents The Travelers Insurance Company, The Travelers Indemnity Company, The Travelers Indemnity Company of America, The Travelers Indemnity Company of Connecticut, The Travelers Indemnity Company of Illinois, The Charter Oak Fire Insurance Company, The Phoenix Insurance Company, and Travelers Casualty and Surety Company (formerly The Aetna Casualty & Surety Company), are direct or indirect wholly-owned subsidiaries of The Travelers Insurance Group Inc., which is, in turn, an indirect, wholly-owned subsidiary of Citigroup Inc., a publicly-traded company.

8. Respondent Liberty Insurance Corporation is a stock company that is owned by respondents Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company, both of which are mutual insurance companies that have no shareholders.

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OPINIONS BELOW

In addition to the opinions cited by the petitioners, the Magistrate Judge issued a Report on July 29, 1998, referred to in the opinions of both the United States District Court and Court of Appeals. The Report is reprinted in its entirety in an appendix to this Brief in Opposition ("App."). The Fifth Circuit denied petitioners' motion for a stay of the issuance of the mandate, without opinion, on December 11, 2000. Justice Scalia denied petitioners' application for a stay before this Court on December 21, 2000. *McKeithen v. United States Fidelity & Guar. Co.*, Letter Ruling Denying Application No. 00A544 (U.S. Dec. 21, 2000).

STATEMENT OF THE CASE

Respondents adopt in full the statement of facts contained in the opinion of the United States Court of Appeals for the Fifth Circuit, *see* Pet. App. 4a-8a, but write separately to correct certain misstatements of fact in the Petition.

This dispute centers around 1995 amendments to Louisiana's Second Injury Fund ("SIF") statute, La. Rev. Stat. §§ 23:1371-1378 (1995). Those amendments reversed Louisiana's longstanding policy of imposing SIF costs on the employers who were the ultimate beneficiaries of the SIF's payment of compensation claims filed by previously-injured workers, and instead, for the first time, imposed those costs on workers' compensation insurers who did not benefit from the SIF scheme.

Prior to the 1995 amendments, Louisiana funded its SIF through an assessment calculated as a percentage of the premiums collected by each workers' compensation insurer for policies issued during the applicable year. Although the assessment initially was collected from the insurer, the original SIF funding scheme was designed to be "cost-neutral to workers' compensation insurers while spreading the costs of second injury benefits among all employers in the State of

Louisiana." Pet. App. 5a. "This policy was implemented in two ways." *Id.*

- "First, when an injured worker filed a second injury claim with an insurer, the insurer paid the claim but obtained reimbursement from the SIF. The insurer was thus an intermediary, with the SIF serving as the ultimate payor of benefits" to the injured worker. Pet. App. 5a.
- "Second, the insurer acted as a conduit through which the SIF passed on reimbursement costs and administrative expenses to insured employers . . . . Louisiana regulators interpreted the 1974 Act to allow insurers to pass these assessments on to employers by including them in the 'expense component' of workers' compensation insurance rates." Pet. App. 5a.

In the late 1980s and early 1990s, Louisiana experienced escalating workers' compensation claims costs because of accelerating medical expenses for treatment of injured workers, state-mandated benefit increases, increasing litigation costs and an economic recession. Louisiana insurance regulators failed to approve rate increases sufficient to keep pace with the increased losses. As a result, Louisiana insurers (including respondents, plaintiffs below) suffered especially severe losses, and numerous companies (including plaintiffs) either withdrew from the market or substantially reduced their underwriting. *See* Pet. App. 7a.

In response to the market withdrawals, in 1995 the Louisiana legislature statutorily changed the SIF funding methodology in order to retroactively assess withdrawing insurers who did not bear such costs under the prior regime. The assessment formula was altered from one based on the premiums collected on policies issued in a given year to an assessment based on the benefits paid under all of an insurers' previously issued workers' compensation policies, including

policies issued years or decades before the amendments were enacted. *See* 1995 La. Acts, No. 188; Pet. App. 6a.

Although the Petition denies that the change was targeted at withdrawing insurers, and cites four other reasons for the amendments (Pet. at 4-7), there is no reference to those other rationales in the statute or its legislative history. Moreover, as the Magistrate Judge found, while the four asserted rationales might have justified *prospective* application of the amendments, none justified *retroactive* application to withdrawing insurers. App. 26a-27a.

The language of the statute and its legislative history reflect only one purpose for the amendments: To shift a substantial portion of the costs of funding the SIF to withdrawing insurers. As one state official testified, the change in assessment methodology "would let us get to them where we are not able to reach them now because it is based on premiums paid . . . . Now if we do it on benefits paid we will be able to assess them." Testimony of Al Walsh, Assistant Secretary for the Office of Workers' Compensation, Louisiana Department of Labor, before the Louisiana House of Representatives Labor and Industrial Relations Committee (Apr. 5, 1995), *reprinted in* Record on Appeal 168-67 ("ROA").[1] Accordingly, the statute was changed to provide expressly that "[a]ny property and casualty insurer that has discontinued writing workers' compensation insurance in this state . . . shall continue to be liable for payment of any assessment to the fund on account of any benefits paid by the property and casualty insurer . . . ." La. Rev. Stat. § 23:1377(C)(2).

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[1] The record on appeal in the Fifth Circuit is consecutively paginated in reverse. References to the ROA conform to the Court's pagination of the record.

The assessments retroactively imposed on withdrawing insurers had a disproportionate impact on them because they could not pass the assessments through to insured employers. "Insurers that have maintained a substantial presence in the Louisiana market can still pass the cost of these assessments to their insureds. But plaintiff insurers that have discontinued writing policies in Louisiana charge no ongoing premiums in the State through which the assessments can be passed." Pet. App. 11a.

Although the Petition contends that the change to a benefits-based assessment merely brought Louisiana into line with the majority of other states that have similar assessment formulas (Pet. at 7-8), there are, in fact, two significant and unique features of the 1995 Louisiana amendments. First, Louisiana is the only state that first assessed the premiums earned on a particular insurance contract but then imposed a second, retroactive assessment on the benefits paid out under the same contract. Second, Louisiana is the only state that has imposed assessments retroactively on insurers that have previously withdrawn from the state.

The Petition makes a number of other factual assertions rejected by the Court of Appeals. First, the Petition contends that plaintiffs received a "windfall" because they never lowered their rates to reflect the fact that the SIF paid for second injury losses. Pet. at 13-14. In reality, however, "[i]nsurers also collected lower premiums in recognition of the fact that they no longer covered the costs of workers' second injury claims." Pet. App. 5a-6a.[2]

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[2] This conclusion was based on the uncontradicted testimony of plaintiff's expert, Dr. Peter Barth, who explained, "Although the SIF relieves insurers of the obligation to pay second injury losses, they collect lower premiums in recognition of the fact that the SIF bears the risk instead of them." ROA 177 (Affidavit of Dr. Peter S. Barth in Support of Plaintiffs' Motion for Summary Judgment).

Second, the Petition contends that "[w]hat [plaintiffs] seek in this lawsuit is to get something for free. The Insurers want to get reimbursed after 1995 without paying assessments after 1995." Pet. at 18. Again, the Court of Appeals squarely rejected this assertion, characterizing it as "specious." Pet. App. 12a. Assessments are not payments required in order to make the insurer eligible for reimbursement from the SIF. Rather, reimbursement simply makes the insurer whole for claims payments previously made to injured workers. *Id.* Thus, withdrawing insurers would receive no "windfall" from continuing SIF reimbursement. They would simply be compensated for making claims payments under previously-issued policies for which they earned no offsetting premium.

REASONS FOR DENYING THE WRIT

I. REVIEW IS NOT WARRANTED BECAUSE OF THE UNIQUE, FACT-SPECIFIC NATURE OF THE FIFTH CIRCUIT DECISION

A. Petitioners Principally Complain About Factual Findings That Do Not Warrant Review by This Court

As the Court of Appeals emphasized, analysis of a Taking Clause claim "involves no set formula and is necessarily *ad hoc* and fact intensive . . . ." Pet. App. 9a; *see also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998). Further, plaintiffs brought an as-applied rather than a facial challenge to the 1995 amendments based on the specific circumstances of their withdrawal from the Louisiana market. The Court of Appeals thus reached its Takings Clause determination based on a highly fact-specific inquiry.

Because of the fact-dependent nature of the decision below, petitioners mount what is essentially a challenge to the factual findings of the Court of Appeals. They chiefly complain that the appellate court failed to recognize the

"[i]nsurers fail[ure] to carry their substantial burden of proof in that they failed to present any evidence to support essential elements of their claim[.]" Pet. at i.

However, the facts relied upon by the Court of Appeals were largely undisputed, as the magistrate, district judge and appellate panel all noted.[3] Moreover, with one exception, the Fifth Circuit carefully considered and rejected in its merits decision the factual arguments now repeated in the Petition.[4]

More importantly, the factual questions emphasized in the Petition do not present an issue of general importance meriting the attention of this Court. It is well-established that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

B. The Fifth Circuit Decision Addressed a Unique Regulatory Scheme

As the Petition itself admits, the regulatory history of the Louisiana Second Injury Fund makes this case unique. Prior to the creation of Louisiana's SIF in 1974, "Louisiana was not only unusual in that it had no second injury fund,

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[3] *See* App. 15a-16a ("The facts related to the history and purpose of the Louisiana Workers' Compensation Second Injury Fund, and the changes resulting from the passage of Act 188, are undisputed."); Pet. App. 22a ("The facts are essentially undisputed and many of the 'facts' are actually issues of law."); Pet. App. 8a n.6 ("[T]he facts are uncontested . . . .").

[4] The one exception is the argument made in the Petition respecting pre-1974 policies. Pet. at 14-16. That argument was never made before the District Court or Court of Appeals until a petition for rehearing, which the Court of Appeals rejected. Because that argument was not timely presented below, it cannot be raised here. *See Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990) ("[A] party may not raise an argument for the first time in a petition for rehearing."); *Federal Deposit Ins. Corp. v. Massingill*, 30 F.3d 601, 605 (5th Cir. 1994) ("'Appellant cannot justify raising [that argument] for the first time in his petition for rehearing.'") (citation omitted).

Louisiana was unique in that it had no workers' compensation commission or other agency which compiled records on 'benefits paid.'" Pet. at 2-3 (footnote omitted). The State's legislative response to this unique status also set it apart: Louisiana was one of only a small number of states that adopted a premiums-based assessment when it enacted its original SIF legislation in 1974. Of greater significance, Louisiana was alone among the states in (1) switching its method of assessment mid-stream, from a premium-based formula to a benefits-based one *and* (2) making that change retroactive to pre-enactment policies *and* (3) specifically targeting withdrawing insurers for payment of the retroactive assessments. *See* La. Rev. Stat. § 23:1377(C)(2).

Consequently, petitioners are wrong in suggesting that, in enacting the 1995 amendments to the SIF statute, Louisiana merely changed its law to make it identical to those in most other states. *See* Pet. at 7-8. To the contrary, the unique regulatory scheme in Louisiana makes the issues presented by the Petition unlikely to recur and thus unlikely to have broad ramifications beyond this case.

II. THE FIFTH CIRCUIT DECISION PRESENTS NO CONFLICT WITH THIS COURT'S DECISIONS OR THOSE OF OTHER CIRCUITS

A. There is No Circuit Split

Petitioners contend that certiorari is warranted in this case because the circuit courts are divided on the question whether *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), applies where the challenged regulation does not affect a discrete property interest. Pet. at 10-11. There is no such split of authority for the simple reason that the Fifth Circuit's determination of a regulatory taking rested, in part, on its conclusion that the Louisiana SIF statute implicated an identifiable property interest of the plaintiffs. Consequently, the Fifth Circuit's decision is fully in accord with those

decisions that read *Eastern Enterprises* to require the demonstration of such a specific property interest.

In *Eastern Enterprises*, this Court held that the so-called "reachback" provisions of the Coal Industry Retiree Health Benefit Act were unconstitutional insofar as applied to Eastern Enterprises. A plurality of four Justices ruled on Takings Clause grounds. Justice Kennedy concurred but disagreed with the plurality's Takings Clause analysis, and instead held the Coal Act unconstitutional under the Due Process Clause. 524 U.S. at 539 (Kennedy, J., concurring).

In so doing, however, Justice Kennedy parted with the plurality's takings analysis in only one respect. Justice Kennedy reasoned that the Takings Clause only applied where "a specific property right or interest has been at stake." *Id.* at 541. In his view, the Coal Act did not affect such a property interest because "[i]t does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest." *Id.* at 540. In all other relevant respects, Justice Kennedy's due process analysis tracked the plurality's takings analysis. *See id.* at 539 ("[M]y view . . . is in full accord with many of the plurality's conclusions. . . .").

The Fifth Circuit took this difference into account by concluding that, even under Justice Kennedy's requirement that the challenged law implicate a specific property right, the Louisiana statute violates the Takings Clause:

> [I]nsofar as Justice Kennedy's specific dispute with the rest of the majority rested on the extent to which a regulatory taking must refer to an identifiable property interest or fund, we believe that dispute would be muted—or mooted—here. The assessments against these plaintiffs arise from the specific fund of benefits they pay to claimants in Louisiana each year. Further, the assessments are charged by the insurers against the fund of reserves set aside from the premiums collected under specific insurance policies.

Pet. App. 18a. Thus, in contrast to the liability imposed by the Coal Act, which did not impose a burden on any previously-existing property right and which was not directed at a specifically-defined asset, the Louisiana assessments did both. The assessments imposed new obligations solely by reason of an insurer's contracts, a long-acknowledged property right. *See Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property within meaning of the Taking Clause). Further, the assessments were targeted at specific property interests in the form of insurer reserves established pursuant to state regulatory requirements.

There is no circuit split here because the Fifth Circuit's ruling on this property interest question did not disagree with the four decisions relied upon by petitioners. All four cases involved the same Coal Act liability as in *Eastern Enterprises* and thus the same absence of an identifiable property right as found by Justice Kennedy. *See, e.g., Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir.), *cert. denied*, 528 U.S. 963 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000).[5] None of these cases addressed the type of distinct property interests at stake in this case. As a result, these cases create no conflict on the proper interpretation of *Eastern Enterprises*.

B. The Fifth Circuit Properly Applied This Court's Takings Clause Jurisprudence

The Petition does not contend that the Court of Appeals applied erroneous legal standards in evaluating plaintiffs' Takings Clause claim. Nor could it, in view of the circuit

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[5] In two of the four circuit decisions cited by petitioners for the purported split, plaintiffs did not timely raise a Takings Clause challenge. *See Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998); *Holland*, 181 F.3d at 605-06.

court's express consideration of the same "three factors of 'particular significance' to a regulatory takings clause analysis" that this Court has emphasized since *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Pet. App. 9a-10a. The only purported inconsistencies with any decision of this Court are alleged factual distinctions between this case and *Eastern Enterprises*. Pet. at 16-17, 23-24, 27-28.

However, these factual distinctions (even erroneously assuming them to be true) would create a conflict between *Eastern Enterprises* and the decision below only if the differences were of such a magnitude as to create doubt whether the lower court properly applied this Court's analytic framework for regulatory takings cases. A comparison of the salient facts in the two cases demonstrates not only that the Court of Appeals applied the correct legal standards but that the circumstances of this case more strongly support the finding of a constitutional violation than in the case of the Coal Act.

Adverse Economic Impact: The most important distinction between this case and *Eastern Enterprises* is the even greater disproportionality of the Louisiana burden than the retroactive obligation imposed on Eastern. Prior to enactment of the Coal Act, Eastern had incurred obligations to pay healthcare benefits to current employees. This Court nevertheless found that the imposition of a new and retroactive obligation to pay benefits to retirees was disproportionate to the company's prior experience because the new mandate was imposed "without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted." *Eastern Enterprises*, 524 U.S. at 531.

Here, unlike the coal company which had incurred employee-related obligations in the past and had benefited from the employment relationship, the plaintiff insurers *had "never profited from the SIF," had never borne any of its*

costs, and had not borne any responsibility for second injury losses paid by the SIF. Pet. App. 12a (emphasis added). Employers, not insurers, benefited from the SIF's assumption of second injury costs; employers, not insurers, ultimately were responsible for assessments levied to pay for the SIF. Thus, as the Court of Appeals emphasized, the retroactive imposition of unrecoverable assessments on withdrawing insurers "reflects no proportionality to the plaintiffs' experience with the SIF." *Id.* If an *increase* in the benefits obligations imposed on Eastern Enterprises was disproportionate to the employer's prior experience, then surely the imposition of a *new* liability on insurers is disproportionate where they had never previously borne any such responsibility.

Reasonable Investment-Backed Expectations: In *Eastern Enterprises*, the Court held that imposition of benefits obligations reaching back 30 to 50 years on Eastern Enterprises interfered with its reasonable investment-backed expectations notwithstanding that the company previously had borne some such obligations (albeit of a different variety). Here, the Louisiana statute has a similarly extreme reachback period: It imposes assessments on benefits paid to permanently-injured workers arising under contracts of insurance entered into at any time after creation of the SIF in 1974 and even benefits paid under contracts entered into *before* the original statutory scheme was created.

There is, however, one significant difference between this case and *Eastern Enterprises*. Eastern, because it had previously borne benefits obligations to employees, might reasonably have expected some future increase in those obligations (although not the disproportionate expansion imposed by the Coal Act). In Louisiana, however, insurers had never borne *any* SIF cost obligation. Thus, "[w]hile plaintiffs might have been on notice that there could be a change away from premium-based assessments, there was no

evidence that the plaintiffs should have suspected abandonment of cost-neutrality." Pet. App. 14a-15a (footnote omitted). More simply, no reasonable insurer could ever have expected that the state would completely reverse its policy of imposing costs on employers, not insurers.

Character of Governmental Action: In *Eastern Enterprises*, this Court determined that even the undeniably serious problem of funding health benefits for retired coal miners did not justify retroactive imposition of a disproportionate obligation on Eastern. Here, there is no such substantial and legitimate state interest but, to the contrary, a highly suspect one.

As the Court of Appeals found, petitioners could not "identif[y] a compelling problem, such as the financial insecurity of the SIF" warranting the imposition of retroactive liability. Pet. App. 17a. To the contrary, an injunction against retroactive enforcement of the statute against plaintiffs would have no financial effect on the state system whatsoever. Although assessments on remaining insurers might be increased somewhat, those insurers would still pass the assessments through to employers, who would continue to bear the full costs of the SIF system as they have in the past. Rather, the only purpose behind the 1995 amendments was to impose costs on insurers solely because of their decision to withdraw from the Louisiana market. "In essence, the State of Louisiana is the troll under the bridge, extracting money from businesses whose sole activity is sending money into the state." Pet. App. 12a.

III. REVERSAL BY THIS COURT WOULD NOT RESOLVE THIS DISPUTE

Finally, this Court's review of the Takings Clause ruling below would not resolve this case. Plaintiffs challenged the 1995 amendments on the independent ground that retroactive application impaired plaintiffs' pre-enactment insurance

contracts in violation of the Contract Clause. While plaintiffs raised this argument before the Fifth Circuit, the court did not reach the issue in light of its Takings Clause ruling. Pet. App. 10a n.8. Consequently, even a favorable Takings Clause decision for the petitioners would not resolve the dispute over the constitutionality of the statute's retroactive application.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Date: February 15, 2001

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action Number 96-385-A-1

UNITED STATES FIDELITY AND GUARANTY COMPANY, *et al.*,

versus

W. FOX MCKEITHEN, *et al.*

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions and recommendations within ten days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Baton Rouge, Louisiana, July 29, 1998.

/s/ Stephen Reidlinger
STEPHEN REIDLINGER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action Number 96-385-A-1

UNITED STATES FIDELITY AND GUARANTY COMPANY, *et al.*,

versus

W. FOX MCKEITHEN, *et al.*

MAGISTRATE JUDGE'S REPORT

This matter is before the court on the parties' cross motions for summary judgment. Plaintiffs in this case are various private insurance groups and companies.[1] These insurers

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[1] The named plaintiffs are 41 private insurance companies: United States Fidelity and Guaranty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., Argonaut Insurance Company, Argonaut Midwest Insurance Company, Argonaut Southwest Insurance Company, Commercial Union Insurance Company, American Central Insurance Company, American Employers' Insurance Company, Employers' Fire Insurance Company, Northern Assurance Company of America, United States Fire Insurance Company, North River Insurance Company, Insurance Company of North America, Banker's Standard Insurance Company, Century Indemnity Company, Cigna Fire Underwriters Insurance Company, Cigna Indemnity Insurance Company, Cigna Insurance Company, Cigna Property and Casualty Insurance Company, Cigna Specialty Insurance Company, Indemnity Insurance Company of North America, Pacific Employers Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Fire Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of the Southeast, Hartford Underwriters Insurance Company, Twin City Fire Insurance Company, Travelers Insurance Company, Aetna Casualty & Surety Company, Travelers Indemnity Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company of Illinois, Charter Oak Fire Insurance

sued the individual members of the Louisiana workers' compensation Second Injury Board [2] (the Board), Louisiana Secretary of Labor Robin M. Houston, and Louisiana Commissioner of Insurance James H. Brown.[3] Plaintiffs sued the individual defendants in their official capacity only for violations of the Takings, Contract, and Equal Protection Clauses of the United States Constitution. Plaintiffs alleged that Act 188 of the 1995 Louisiana legislature [4], which changed the method of calculating the assessments needed to operate the Workers' Compensation Second Injury Fund (SIF), violated these constitutional provisions. Specifically, the plaintiffs alleged that insofar as Act 188 based assessments on benefits paid pursuant to insurance policies the plaintiffs wrote prior to its effective date, the legislation is unconstitutional.[5] Plaintiffs sought a declaration of unconstitutionality and an injunction preventing the defendants from

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Company, Phoenix Insurance Company, Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, and Liberty Insurance Corporation.

[2] The members of the Board named in the amended complaint are: Louisiana Secretary of State, W. Fox McKeithen, Louisiana State Treasurer Ken Duncan, Louisiana Director of Workers' Compensation Ron Menville, Louisiana Commissioner of Insurance James H. Brown, and Louisiana Secretary of Social Services, Madlyn B. Bagneris. The state legislature created the Louisiana Workers' Compensation Second Injury Board. La.R.S.23:1372. The Board is composed of five members who shall be the Secretary of State, the State Treasurer, the Commissioner of Insurance, the Secretary of the Department of Social Services and the Director of the Office of Workers' Compensation Administration.

[3] These are the defendants named in the amended complaint filed August 27, 1996. Record document number 37. In the initial complaint the plaintiffs also sued Louisiana Attorney General Richard P. Ieyoub in his official capacity. Plaintiffs filed an unopposed motion to dismiss the attorney general without prejudice, which was granted on August 23, 1996. Record document numbers 31 and 32.

[4] La.. R. S. 23:1371, *et seq.*

[5] Act 188 was effective June 12, 1995. La.R.S.23:1377.

collecting or imposing any future assessments or sanctions against them under Act 188.

Plaintiffs moved for summary judgment as to counts I and II of the amended complaint. In support of their motion and in opposition to the defendants' summary judgment motion, the plaintiffs relied upon a statement of undisputed facts, the affidavit of Peter S. Barth attached with Exhibits 1 through 6, the supplemental affidavit of Barth, attached with Exhibit 2, and Exhibits A, B and C. Plaintiffs also submitted the affidavits of representatives of each of the insurance groups to which the individual insurance companies belonged: Dennis J. Hammer,[6] Wade T. Overgaard,[7] Angela G. Skow,[8] Brian Mibus,[9] Daniel Goddard,[10]

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[6] Hammer is the vice president and controller of plaintiffs United States Fire and North River Insurance Companies which are members of the Crum & Forster Insurance group.

[7] Overgaard is an actuary of the Travelers Indemnity Company. Overgaard's affidavit was submitted on behalf of the plaintiffs in the Travelers Group: Travelers Insurance Company, Travelers Indemnity Company of America, Travelers Indemnity Company of Connecticut, Travelers Indemnity Company of Illinois, Charter Oak Fire Insurance Company, Phoenix Insurance Company, Aetna Casualty and Surety Company, Aetna Casualty & Surety Company of Illinois, Automobile Insurance Company of Hartford, Connecticut, Farmington Casualty Company and Standard Fire Insurance Company.

[8] Skow is the underwriting manager of the southwest division of Argonaut Insurance Company. Her affidavit was submitted on behalf of the plaintiffs in the Argonaut Insurance Group: Argonaut Insurance Company, Argonaut Midwest Insurance Company and Argonaut Southwest Insurance Company.

[9] Mibus is the division manager of business market underwriting for Liberty Mutual Insurance Company. His affidavit was submitted on behalf of plaintiffs Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company and Liberty Insurance Corporation.

[10] Goddard is the actuary and director of workers' compensation and managed care for Hartford Fire Insurance Company and its affiliates. His affidavit was submitted on behalf of the plaintiffs in the ITT Hartford Group, Inc.: Hartford Accident and Indemnity Company, Hartford

John A. Godfrey,[11] Kenneth R. Solomon,[12] nd Michael K. Miller.[13]

Defendants moved for summary judgment on the plaintiffs' Takings, Contract, and Equal Protection Clause claims. In support of their motion for summary judgment and in opposition to the plaintiffs' motion, the defendants submitted a statement of disputed facts and the affidavit of James E. Campbell, director of the state's Second Injury Board, attached with Exhibits 1 and 2.

Summary Judgement Standard and Applicable Law

Summary judgment is only appropriate when the moving party, in a properly supported motion, demonstrates that there

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Casualty Insurance Company, Hartford Fire Insurance Company, Hartford Insurance Company of the Midwest, Hartford Insurance Company of the Southeast, Hartford Underwriters Insurance Company, and Twin City Fire Insurance Company.

[11] Godfrey is the assistant vice president in charge of workers' compensation for Commercial Union Insurance Company. His affidavit was submitted on behalf of the plaintiffs that are members of the Commercial Union Group: Commercial Union Insurance Company, American Central Insurance Company, American Employers' Insurance Company, Employers' Fire Insurance Company, Northern Assurance Company of America.

[12] Solomon is vice president of workers' compensation for United States Fidelity and Guaranty Company. His affidavit was submitted on behalf of the plaintiffs in the USF&G Group: United States Fidelity and Guaranty Company, fidelity and Guaranty Insurance Company, and Fidelity and Guaranty Insurance Underwriters, Inc.

[13] Miller is a management level employee of Insurance Company of North America. Miller's affidavit was submitted on behalf of the plaintiffs collectively known as the CIGNA Companies: Insurance Company of North America, Banker's Standard Insurance Company, Century Indemnity Company, Cigna Fire Underwriters Insurance Company, Cigna Indemnity Insurance Company, Cigna Insurance Company, Cigna Property and Casualty Insurance Company, Cigna Specialty Insurance Company, Indemnity Insurance Company of North America, Pacific Employers Insurance Company.

is no genuine issue of material fact, and that it is entitled to judgment in its favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-55 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986) ; Rule 56 (c) , Fed.R.Civ.P. If the moving party carries its burden under Rule 56(c), the opposing party must direct the court's attention to specific evidence in the record which demonstrates that it can satisfy a reasonable jury that it is entitled to verdict in its favor. *Anderson*, 106 S.Ct. at 2512; Rule 56 (e). This burden is not satisfied by some metaphysical doubt as to the material facts, conclusory allegations, unsubstantiated assertions or only a scintilla of evidence. *Little v Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994). After adequate time for discovery, Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which it will bear the burden of proof at trial. *Celotex*, 106 S.Ct. at 2552. Summary judgment is appropriate in any case where evidence is so weak or tenuous on essential facts that it could not support a judgment in favor of the nonmoving party. *Little*, 37 F.3d at 1076. In resolving the motion the court must view the facts and inferences in the light most favorable to the nonmoving party, and the court may not evaluate the credibility of the witnesses, weigh the evidence or resolve factual disputes. *International Shortstop., Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936 (1992).

The substantive law identifies which facts are material. *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195 (1994). In this case the court must apply the law applicable to claims brought under the Takings Clause of the Fifth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the

Contract Clause found in Article I, Section 10 of the Constitution.[14]

The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's prohibition applies to the states through the Fourteenth Amendment. *Williamson County Regional Planning Commission v, Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 3111 (1985). Its purpose is to prevent the government "from forcing some people alone to bear public burdens which, an all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960). There are "classic" takings in which the government directly appropriates private property for its own use. *Eastern Enterprises v. Apfel*, ___U.S. ___ 118 S. Ct. 2131 (1998). This case does not involve a classic taking, but an alleged taking arising from an economic regulation—a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*, citing, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978).

Parties challenging governmental action as a taking in violation of the Fifth Amendment bear a substantial burden, since government regulation often involves curtailing some potential for the use or economic exploitation of private property. *Eastern Enterprises, supra, citing, United States v. Sperry Corp.*, 493 U.S. 52, 60, 110 S.Ct. 387, 393-394 (1989); *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326 (1979). Not every destruction or injury to property by governmental action has been held to be a taking in the constitutional sense. The process for evaluating the constitutionality of a governmental regulation involves an

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[14] Plaintiffs taking and equal protection claims were brought pursuant to 42 U.S.C. § 1983.

examination of its justice and fairness, which does not lend itself to any set formula. Therefore, determining whether justice and fairness require that economic injuries caused by a regulation must be compensated by the government, rather than remain disproportionately concentrated on a few persons, is essentially an ad hoc and fact intensive inquiry. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383, 390 (1979). The Supreme Court has identified several factors that have particular significance in this inquiry: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations, and (3) the character of the governmental action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 1026 (1986).

Article I, Section 10 of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." It is well settled that the prohibition against impairing the obligation of contracts is not to be read literally. *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433, 54 S.Ct. 816, 818 (1934). The context and history of the Contract Clause, as well as its jurisprudence, indicate that its primary focus was on legislation that was designed to repudiate or adjust pre-existing debtor creditor relationships that obligors were unable to satisfy. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 503, 170 S.Ct. 1232, 1251 (1987), *citing*, *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231 (1934). The relevant inquiry in analyzing a claim under the Contract Clause is whether the change in state law has "operated as a substantial impairment of a contractual relationship." *General Motors Corporation v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 1109 (1992). This inquiry has three components: whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial. *Id.*

The court should begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment. *Keystone Bituminous Coal*, 480 U.S. at 504, 107 S.Ct. at 1251-52 (1987). If the court finds that the state's action operates as a substantial impairment of the contractual relationship, then the court must examine the state's asserted justifications for the impairment. The finding of a significant and legitimate public purpose is not, by itself enough to justify impairment of contractual obligations. Id. A court must also satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties is based on reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the legislation. *Energy Reserves Group., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412, 103 S.Ct. 697, 704 (1983). However, unless the state itself is a contracting party, courts should properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. *Id.*

The Equal Protection Clause of the Fourteenth Amendment prohibits the state from denying "to any person within its jurisdiction the equal protection of the laws." Most laws differentiate in some way between classes of persons. The Equal Protection Clause does not forbid classifications, but keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 2331 (1992). When economic legislation is challenged solely as violating the Equal Protection Clause, courts consistently defer to legislative determinations as to the desirability of particular statutory discriminations. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 2516 (1976). Legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequality. *Nordlinger, supra.* Therefore, it is well established that unless a classification warrants heightened review because it involves a fundamental right or suspect

distinction such as race, religion, or alienage, the court presumes the constitutionality of the statutory discrimination and requires only that the classification challenged be rationally related to a legitimate state interest. *Id.* In the economic sphere it is only invidious discrimination, the wholly arbitrary act, which is inconsistent with the Fourteenth Amendment. *City of New Orleans, supra.*

Motion to Dismiss by the Defendants

Defendants initially filed a motion to dismiss which was converted to a summary judgment motion by the court. Record document numbers 20, 21, 49. The motion raises several threshold issues which must be resolved before proceeding to the plaintiffs' substantive claims. Those issues are: party defendants, absolute immunity, and ripeness.

Party Defendants

Defendants asserted that the plaintiffs did not state a claim against Attorney General Ieyoub in his official capacity because they cited no statute stating that the Attorney General was ultimately responsible for bringing legal action to enforce Board assessments. This argument is moot. Plaintiffs filed an unopposed motion to dismiss any claims against the attorney general without prejudice, and that motion was granted.[15]

Defendants also maintained that the plaintiffs failed to state a claim against Brown as Commissioner of Insurance, essentially arguing that it is unnecessary to sue Brown in his official capacity as commissioner since they have named him as a defendant in his official capacity as a member of the Board. Defendants do not dispute the plaintiffs' alleged reasons for naming Brown in his official capacity as

[15] Record document numbers 31 and 32.

commissioner.[16] Plaintiffs brought the action against Brown in both his official capacity as commissioner and member of the Board. Defendants advanced no valid reason to dismiss the claims against Brown in his capacity as commissioner. The motion to dismiss Brown as a defendant in his capacity as Commissioner of Insurance, should be denied.

Absolute Immunity

Defendants argued that the members of the Board are entitled to absolute immunity when performing the legislative function of computing the annual SIF assessments. Defendants relied upon the line of cases finding absolute legislative immunity for federal, state and local legislators and officials engaging in legislative functions.[17] Plaintiffs argued that absolute immunity is a personal defense that does not apply here since the individual Board members have been sued only in their official capacity.

The cases cited and relied upon by the defendants make it clear that the defense of absolute legislative immunity protects legislators and officials performing legislative functions when they are sued in their individual capacities for damages. The defense provides no shield for officials sued in their official capacity.[18] It is clear 'that the plaintiffs have only sued the members of the Board in their official capacity.

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[16] Record document number 37, pph. 20, amended complaint. Plaintiffs sued Brown in this capacity because as the Commissioner of Insurance he has the power to issue, revoke and suspend licenses to transact insurance business in the state. Act 188 authorizes the commissioner to suspend or revoke the license of an insurer that has not paid its assessment within 60 days from the time it is notified of the assessment.

[17] *See, Hughes v. Tarrant County Texas*, 948 F.2d 918, 919-20 (5th Cir. 1991) and cases cited therein.

[18] *See, Kentucky v. Graham*, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105-06 (1985).

Therefore, the personal defense of absolute legislative immunity does not warrant dismissal of the plaintiffs' claims against the board members.

Ripeness

Defendants asserted that the plaintiffs' Takings Clause claim should be dismissed because it is not ripe for review under the principles set forth in *Williamson County*, *supra*, and *Liberty Mutual Insurance Co. v. Louisiana Department of Insurance*, 62 F. 3d 115 (5th Cir. 1995). Defendants argued that the plaintiffs should have brought this claim initially in state court. According to the defendants, the plaintiffs could have gone to the Board and presented their objection to the first assessment made in 1995, and then under the state Administrative Procedure Act petitioned the state district court to review the Board's decision.

Plaintiffs contended that the decisions in *Williamson County* and *Liberty Mutual* are not applicable in this case because the parties in those cases had already experienced a taking and were seeking a retrospective damages remedy. Plaintiffs pointed out that they are complaining about a threatened taking and seek only prospective injunctive relief prohibiting enforcement of what they believe is an unconstitutional law. They challenged the fact of the assessment, not the amount assessed, and seek no damages for past taking, only prospective injunctive relief against any future taking.

In *Williamson County* the Supreme Court explained the principles of ripeness in the special context of a Fifth Amendment taking claim. The Court pointed out the distinction between exhaustion of state administrative remedies, which is not required before bring a section 1983 action, and whether an administrative action must be final before it is judicially reviewable. *Williamson County*, 473 U.S. at 192, 105 S.Ct. at 3119. The Court explained that in

the context of an alleged unconstitutional taking, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual injury. The exhaustion requirement refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy. *Id.*, at 192, 105 S.Ct. at 3120.

The Fifth Amendment proscribes takings without just compensation. Therefore, no constitutional violation occurs until there has been a taking and just compensation has been denied.[19] The Court held that because of the nature of a Takings Clause claim, two criteria must be satisfied before the claim is ripe for review. First, the relevant governmental unit must have reached a final decision applying the challenged rule to the owner's property. Second, the plaintiff must seek compensation for the alleged taking through whatever adequate procedures the state provides.[20]

Neither *Williamson County* nor *Liberty Mutual* addressed the issue of ripeness in the context of a challenge to legislation as an unconstitutional taking. These decisions involved commissions from which the plaintiffs were requesting approval of building plans and rate increases, respectively. In both cases the parties filed suit seeking damages for an alleged unconstitutional taking, yet there were additional procedures and requests the parties could have made before administrative bodies that might have obviated the taking.

The present case is easily distinguished from *Williamson County* and *Liberty Mutual*. This case involves a claim that state legislation amounts to an unconstitutional taking.

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[19] *See, Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991), *citing, Williamson County*, 473 U.S. at 194 n.13, 105 S.Ct. at 3120 n.13.

[20] *Williamson County, supra*; *Hidden Oaks Ltd. V. City of Auston*, 138 F.3d 1036, 1041 (5th Cir. 1998).

Defendants cannot and do not argue that in regard to the new method of assessment under Act 188 they have not arrived at a definitive position on the issue that will result in concrete injury to the plaintiffs. The legislature passed Act 188, and it is now in effect and being enforced by the Board and other state officials.

Even though the plaintiffs here are asking only for prospective injunctive relief from the application of Act 188, it is undisputed that the new legislation has already been applied to them. Thus, it is evident that the defendants have taken a final definitive position on the state's actions which the plaintiffs allege will cause them harm. The rationale underlying the ripeness doctrine as applied to a Takings Clause claim, which is the finality of the state's decision to take the plaintiffs' property without providing just compensation, appears to be satisfied here.

Citing La.R.S.49:964, the defendants argued that the plaintiffs' should have complained to the Board about the 1995 assessment and then appealed the assessment. However, this statutory right to judicial review of administrative actions applies only to final decisions and orders of an agency adjudicatory proceeding. Though the defendants stated that the plaintiffs could have appeared before the Board, they do not assert that the SIF statutes or regulations provide for notice and the holding of an adjudicatory hearing in which a decision levying the assessment is made only after presentation of evidence and arguments. See, La.R.S.49:955-49:959. Nothing in the law or record relied upon by the defendants supports the argument that the plaintiffs could have possibly prevented or ameliorated the alleged taking by appearing before the Board, or that the plaintiffs would have any right of review of the 1995 assessment or any future assessment under the state Administrative Procedure Act.

The second prong of the ripeness test of *Williamson County* is that a Takings Clause claim is premature if the state provides an adequate procedure for seeking just compensation, but the plaintiffs have not used the procedure and been denied just compensation. Again, in this case it is clear that the plaintiffs would have no state agency or court to complain to that their property was being taken in violation of federal law. In making the assessment under Act 188, the Board is essentially making a calculation in accordance with the legislation as written.[21] Defendants have not shown that there is any adequate state administrative or judicial procedure available that the plaintiffs could pursue which would provide them with just compensation.[22] Defendants' motion to dismiss the plaintiffs' Takings Clause claim, as not ripe for review, should be denied.[23]

Takings Clause Analysis

The facts related to the history and purpose of the Louisiana Workers' Compensation Second Injury Fund, and the changes resulting from the passage of Act 188, are

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[21] The court in *Liberty Mutual* did state that the principles of Williamson also applied to the plaintiff's Takings Clause claim that sought only prospective relief in the form of a rate increase, not damages. *Liberty Mutual*, 62 F.3d at 118. In this case the plaintiffs seek prospective relief from enforcement of the law, and are not asking that the state do something affirmative such as grant a rate increase.

[22] One might argue that the claim is not ripe because the plaintiffs could receive just compensation in the form of damages if they were successful in challenging the constitutionality of the law in state court. There is nothing in *Williamson County* or *Liberty Mutual* or the rationale behind the ripeness doctrine, which indicates that the plaintiffs' must first attack the constitutionality of this legislation in state court in order for it to be ripe for judicial review here.

[23] A plaintiff bears the burden of showing that resort to state procedures would be futile. Samaad, 940 F.2d at 933. This principle does not apply here since there are no adequate state procedures available to the plaintiffs.

undisputed. Some of these facts are set forth in the plaintiffs' statement of undisputed facts and the statute itself. The others are included in the affidavits of Barth and Campbell. It is helpful to provide some of these facts as a background for the analysis of the plaintiffs' claims.

The Louisiana legislature established the Workers' Compensation Second Injury Fund in 1974. Its stated purpose is to encourage the employment of physically handicapped employees who have a permanent, partial disability by protecting employers and insurers from excess liability for workers' compensation when a subsequent injury to such an employee merges with a preexisting disability resulting in a greater disability than would have resulted from the subsequent injury alone.[24] The purpose and organization of the SIF did not change with the passage of Act 188. It continues to be maintained as a separate account in the state treasury. The funds are used to pay the administrative expenses of the Board and reimburse compensable second injury claims paid by employers or their insurers. All assessments are made payable to the state treasurer, transmitted to the Board and credited to the SIF by the state treasurer. La.R.S.23:1377.A (1974); La.R.S.23:1377.A. and B. (2) (1995). The 1995 legislation did add a specification that any remaining, unencumbered balances at the end of each fiscal year must remain in the fund to be used only for the two purposes of the fund—paying the administrative expenses of the Board and reimbursing compensable claims.

The annual funding for the SIF comes from assessments paid into the fund by insurers and self-insured employers. Prior to the effective date of Act 188, the amount paid into the fund each year by insurers was calculated as a percentage of the gross premiums the insurer received for workers'

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[24] La.R.S.23:1361.A.; Barth's Aff. Pphs. 17-25, 28, 29, 31; Campbell's Aff. Pphs.7, 8, 9.

compensation insurance in the preceding calendar year. Self-insureds were assessed a percentage of the workers' compensation insurance premiums they would have paid had they been insured.[25]

The key change brought about by the legislation in 1995 was the change in the method of assessing the annual contribution to the SIF by insurers, self-insurers, and group self-insurance funds. Under Act 188, the annual assessment is no longer computed based on a percentage of premiums, but is based on the amount of workers' compensation benefits paid by the insurer or self-insured in the previous calendar year.[26] This change, plaintiffs claim, has a retroactive effect on the workers' compensation policies they entered into before the effective date of the law. It is this change which the plaintiffs assert affects an unconstitutional taking of their property.

The aspects of Act 188 challenged by the plaintiffs must be evaluated by engaging in an ad hoc and fact intensive inquiry into the justice and fairness of the legislation, focusing on the three significant factors recently reaffirmed by the Supreme Court in *Eastern Enterprises*. Review of the entire summary judgment record in light of these principles leads to the conclusion that the application of Act 188 to the plaintiffs' insurance contracts entered into before the law's effective

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[25] La.R.S.23:1377.B. (1974); Barth's Aff. Pph. 31; Campbell's Aff. Pphs.lla,llb.; plaintiffs' statement of undisputed facts, number 2

[26] This amount is reported on the form required to be filed each year with the Louisiana Office of Workers' Compensation. La.R.S.23:1377.B. (1). This section states that the forms used by the Board to compute the benefits-based assessments are those annual reports required by R.S.23:1291.1 (A). This reference is to the report that all insurers and employers must file annually with the office of workers' compensation, stating what they actually paid out in workers' compensation benefits the previous calendar year. A copy of the form is attached to Campbell's affidavit as Exhibit 1.

date, creates a taking of their property without just compensation.

Economic Impact

There is some discrepancy in the facts relied upon by each side in regard to the economic impact of Act 188 on the plaintiffs. Ultimately these differences are not material. The costs to achieve the purpose of the SIF was to be spread among all employers. According to the affidavits of both Barth and Campbell, the premiums-based method of assessment in effect before Act 188 was cost neutral to insurers such as the plaintiffs.[27] The insurers were entirely intermediaries in the operation of the state's SIF.[28] Insurers such as the plaintiffs included the expense of the annual SIF assessments as part of the premiums they charged to an employer for the workers' compensations policy. Barth explained this pass through in his affidavit: "By including the assessment in the premium notice, the insurer is simply reimbursed by employers, on a dollar for dollar basis, for an assessment that would otherwise be borne by the employers directly." Barth's Aff. Pph.38. Campbell's testimony is clearly consistent with Barth's statement: "The prior assessments on premiums were really assessments on the employers of Louisiana, who bought a workers' compensation policy. The insurance companies simply raised their rates on worker's compensation policies to cover the Second Injury Fund Assessment; therefore, there was no net cost to the insurance companies. The employers of Louisiana actually paid the assessment." Campbell Aff. Pph.18.

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[27] Barth's Aff. Pphs. 33,34,36,37,38,39,40,41,44,45,46; Campbell's Aff. Pph.18.

[28] Barth's Aff. Pph. 34 (explaining equalization of burden to all employers). Barth also explained in his affidavit that it was simpler and less expensive administratively for the state to assess a few hundred insurers rather than assess thousands of employers across the state. Barth's Aff. Pphs. 36 and 37. This is not refuted by Campbell's affidavit or any other evidence presented by the defendants.

Under Act 188 and the prior law, self-insureds and insurers such as the plaintiffs again served as intermediaries when it came to reimbursement for second injury claims from the SIF.[29] They paid the injured employee worker's compensation benefits and then applied to the Board for reimbursement from the SIF for qualified claims. According to Barth, qualified second injury losses were ultimately paid from the SIF and not by insurers. Therefore, insurers received no net benefit from the second injury fund. Barth's Aff. Pph. 39. There is no genuine dispute that the premiums-based method of assessing insurers prior to Act 188 resulted in no net cost or benefit to the plaintiffs.

Plaintiffs in this case are all insurers which, before the passage of Act 188, had substantially reduced the amount of workers' compensation policies they issued in Louisiana.[30] This fact is undisputed by the defendants.[31] Beginning with the effective date of Act 188, the law required the annual

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[29] The statute states that an employer, or if insured, his insurer, must pay the workers' compensation benefits to a worker who comes within the statute's definition of "permanent partial disability", and then apply and qualify for reimbursement of the benefits paid from the SIF. The procedure for employers and insurers to apply and qualify for reimbursement is set forth in La.R.S. 23:1378; Barth's Aff. Pph. 41.

[30] One of the changes to the second injury law in Act 188 was a specific provision that the new method of assessment based on benefits paid, must be paid by any insurer that had discontinued writing workers' compensation insurance in the state. La.R.S.23:1377.C. (2).

[31] All of the plaintiffs substantially reduced their underwriting of workers' compensation policies in Louisiana in the years before passage of Act 188. These facts are set forth in each of the affidavits submitted by the plaintiffs from the representatives of each insurance group. These facts are unrefuted by the defendants and it is unnecessary to repeat them all in detail here for each plaintiff insurer. *See*, paragraph 21 of the affidavits of Hammer, Overgaard, Mibus, and Goddard; paragraph 21 and 22 of the affidavits of Godfrey and Miller; paragraph 23 of Skow's affidavit; Solomon's affidavit, paragraph 20 (USF&G companies have effectively ceased writing except for deminimus coverage).

assessment to be computed as a percentage of the reported workers' compensation benefits paid the previous year by each insurer, self-insurer and group self-insurance fund. As to contracts entered into before Act 188, this change in the base figure for computing the assessments was significant. Plaintiffs are no longer collecting premiums on these contracts, yet the plaintiffs continue to be obligated to pay benefits for claims under them. The prior law did not base assessments on contracts for which they were no longer collecting premiums. Under Act 188 benefits paid under those same contracts now form part of the base figure for computing the plaintiffs' SIF assessment. Yet, since the plaintiffs are no longer collecting premiums on these contracts and have substantially reduced the workers' compensation policies they write in the state, they have no means to pass on the cost of the assessment. Although theoretically the plaintiffs could pass on the new costs through the premiums they collect on the remaining policies they write, such a move would call for such a high increase in premiums that even if the rates were approved, the plaintiff insurers could not compete in the market.[32] Thus, the plaintiff insurers effectively have no way to pass on the cost of the assessment as applied to benefits paid pursuant to contracts entered into before the effective date of Act 188.

In each affidavit the plaintiffs submitted figures on the 1995 assessments, estimates of the assessment for 1996, and the future impact of the law. It is unnecessary to recite and analyze all these different figures. Accepting as true the 1995 assessment figures presented by the defendants, the new law has resulted in a cost to the plaintiffs of approximately 5 million dollars.[33] Defendants do not argue or attempt to

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[32] *See*, Affidavits: Hammer, pphs.21-23; Overgaard, pphs.21-24;Skow, pphs.23-26; Mibus, pphs. 20-21; Goddard, pphs.21-23; Godfrey, pphs. 21-25; Solomon, pph.20; Miller, pphs.22-25; Barth's Aff.Pphs.58-60.

[33] *See*, Exhibit 2 attached to Campbell's affidavit.

provide any evidence that the plaintiffs are able to pass through the cost of this 1995 assessment under the new law through their premiums or any other mechanism. The only argument offered by the defendants is that the plaintiffs have not experienced a negative economic impact, because they have received a reimbursement benefit of over a million dollars under the new law. Campbell stated these figures in his affidavit and attached an exhibit to show essentially that the plaintiffs paid over 5 million dollars in assessments, but received over 6 million dollars in reimbursements from the SIF. Based on this evidence he contended that the plaintiffs have not suffered any negative economic impact but received a positive reimbursement benefit.[34]

Even if these figures are accepted as true, this evidence does not refute plaintiffs' evidence of the net cost to them under the new law. Campbell's statement leaves out the critical fact that reimbursement from the SIF is not reimbursement for the assessments the plaintiffs paid into the SIF.[35] As established by both Barth's and Campbell's affidavits and the SIF statute, the reimbursement to the plaintiffs was for the qualified benefits they paid to disabled workers pursuant to workers' compensation policies they issued. Since it is undisputed that the reimbursement is for claims the insurers actually paid and not assessments, how did the plaintiffs receive reimbursement for the 1995 assessment? Defendants evidence does not address or answer this question. The only conclusion is that as to the plaintiffs these assessments on benefits paid under contracts pre-dating Act 188 are new liabilities that the plaintiffs are unable to recoup.[36] This amounts to a transfer of the plaintiffs' assets to the state for public use.

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[34] Campbell Aff. Pph. 13g.

[35] Barth's Aff.Pph.65;Barth's Supp.Aff.Pphs.17-20.

[36] Barth's Aff.Pphs.21,22 (explanation of correct method of evaluating economic impact of Act 188 on the plaintiffs).

Both sides advanced arguments about whether the application of Act 188 to pre-enactment policies amounts to retroactive legislation, or assessing the same contract twice. The characterization of retroactive or double assessment is irrelevant if the undisputed fact is that after the change in the law the plaintiffs are required under the threat of civil penalties to transfer a substantial amount of their money to the state treasury without being compensated or reimbursed. Nevertheless, as stated by the Supreme Court in *Eastern Enterprises*, such a permanent deprivation of assets does not always result in an unconstitutional taking. This is because in the course of regulating, Congress (or in this case the state), routinely creates burdens for some that directly benefit others. Therefore, legislation is not unlawful solely because it upsets otherwise settled expectations.[37] The court must also look to any parts of Act 188 by which the plaintiffs can "moderate and mitigate" the economic impact. *Eastern Enterprises*, 118 S.Ct. at 2148, *citing*, *Connolly*, 475 U.S. at 225-26, 106 S.Ct. at 1026-27.

In this case the law itself contains no provisions by which the plaintiffs can avoid or mitigate the impact of the new assessment.[38] If the plaintiffs refused to pay the assessment they would be subject to substantial penalties, including a civil penalty equal to 20% of the amount assessed that remains unpaid, and suspension or revocation of their right to transact business by the commissioner of insurance.[39] Theoretically, some of the plaintiffs could pass through some

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[37] *Eastern Enterprises*, 118 S.Ct. at 2148, *citing*, *Connolly*, 106 S.Ct. at 1025.

[38] Obviously, under their policies and state law the plaintiffs cannot refuse to pay second injury claim benefits to injured workers covered by their policies. Barth's Aff.Pph.56.

[39] La.R.S.23:1377.C. (1) and 23:1377.E.

of the costs to their current customers.[40] The only mitigating measure suggested by the defendants was that the plaintiffs could choose to write more workers' compensation policies in the state.

Under the jurisprudence these are not the type of measures that have been considered as moderating the economic impact of a regulation. For example in *Connolly*, the Multiemployer Pension Plan Amendments Act of 1980 had a significant number of provisions included in the legislation by which the employer could mitigate his liability.[41] Defendants suggestion of how the plaintiffs could mitigate their new costs under Act 188 clearly are not found in the law itself. Moreover, this suggestion puts the entire burden on the plaintiffs to moderate the impact, and would require them to take uncertain business risks in order to mitigate their liability.[42]

Nor does this new liability imposed upon the plaintiffs by Act 188 reflect any proportionality to the plaintiffs' experience with the SIF. Plaintiffs' relationship with the SIF prior to Act 188 was the role imposed by the statute beginning in 1974—intermediary in the collection of assessments from employers and intermediary in the payment of second injury benefits. This intermediary role carried no monetary liability. Defendants have not argued or cited anything indicating that the policy, purpose, or beneficiaries of the second injury law have changed since 1974. Yet, the

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[40] This argument is purely theoretical. Defendants have not argued or presented any evidence that the plaintiffs would be able to do this. As already stated, the plaintiffs evidence that they would have to raise rates to noncompetitive levels to pass on the costs of the new assessments, is uncontradicted by the defendants.

[41] *Connolly*, 475 U.S. at 226, 106 S.Ct. at 1026-27, n.8.

[42] In *Eastern Enterprises*, the fact that Eastern might be able to seek indemnification from others was not considered a significant mitigating or moderating factor. *Eastern Enterprises, supra*, 118 S.Ct. at 2150.

plaintiff insurers now bear a significant cost of contributing to the fund with no identifiable offsetting benefit.

Defendants argued that under the old law the plaintiffs were no longer paying assessments on their contracts, yet could still claim reimbursement. This argument is unpersuasive. Again, the law is designed so that entitlement to reimbursement arises from payment of second injury benefits, not assessments. Admittedly, when employers and insurers obtain reimbursements, they may be using the fund and creating administrative costs for the Board. But, the defendants have not argued or presented any evidence that the administrative costs created by the plaintiffs continuing to apply for reimbursements are equivalent to or a fair approximation of the amount of new assessment liability imposed on them by Act 188.[43]

Interference With Reasonable Investment Backed Expectations and Nature of the Government Action

The other factors which must be addressed are the level of interference with the plaintiffs' reasonable investment backed expectations, and the nature of the government action. These can be discussed together since so many of the same facts apply to these two issues. For 20 years, from 1974 until 1995, the state maintained the same policy and method of funding and operating the SIF. Plaintiffs had relied on this scheme, particularly the fact that the economic impact on them was neutral. Barth's Aff. Pphs.31-35.48-53. The model legislation suggested benefits-based assessments[44], and there were difficulties in computing assessments based on premiums for self-insurers. However, there is no evidence

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[43] Defendants did not argue or present any evidence the new liability placed on the plaintiffs by Act 188 is a "user fee" which fairly approximates the cost of the benefit supplied by the state. *See, U.S. v. Sperry*, 493 U.S. at 60-64, 110 S.Ct. at 394-95.

[44] Barth's Aff. Pph.31, Exhibit 4.

that the plaintiffs had any reason to suspect prior to 1995 that the state was contemplating changing to benefits-based assessments. There is also no evidence that the cost of financing the SIF was ever intended to be borne by insurers, that there existed any rationale or policy for imposing this cost on insurers, or that the state was contemplating shifting the burden of the funding to insurers. Barth's Aff.Pphs. 32-42; Barth's Supp.Aff.Pphs.11,12. Thus, while the plaintiffs might have been on notice of a possible change to benefits-based assessment, they were clearly not on notice that the change would mean a new and substantial obligation that they could not readily pass through to their insureds.

The only evidence of notice offered by the defendants is that the insurance companies' lobbyist was aware when Act 188 came before the legislative committee and no one representing the insurers came to testify or object to the legislation. Campbell's Aff.Pph.25. The problem with this argument is that it assumes that the interests of all insurance companies are the same.[45] Furthermore, knowledge that a measure is coming before a legislative committee is not the type of notice that would have allowed the plaintiffs to make business decisions knowing that there might be some new cost or liability imposed on them. In discussing this factor, the Supreme Court in *Eastern Enterprises* noted: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations

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[45] Plaintiffs do not oppose the need to change to benefits-based assessments in general, or dispute the reasons given by the defendants that the change was needed. Plaintiffs challenge is the effect on them of those aspects of Act 188 which make the new method of assessment apply to the benefits paid pursuant to policies issued before the effective date of the new law. They only argued that the defendants' cannot justify the retroactive economic impact the plaintiffs challenged as an unconstitutional taking.

should not be lightly disrupted." *Eastern Enterprises*, 118 S.Ct. at 2152.

Under Act 188, any workers' compensation insurance policy under which benefits are being paid, no matter how many years prior to the new law it was entered into, will form part of the basis for computing the plaintiffs' assessment liability. This new liability placed on the plaintiffs is unrelated to any of the plaintiffs' past commitments, or conduct (other than the fact that they entered into contracts of workers' compensation insurance in the state). With no pattern of conduct on the part of the state to indicate an impending change of this nature, merely doing business in a highly regulated field is an insufficient basis to conclude that the plaintiffs' actions should have or could have been influenced by the risk of imposition of this new liability.[46]

Also, the nature of the government action here is unusual because there are no indications in the law, legislative history, or record of this case that the SIF was not secure financially, or that employers were having problems bearing the costs of operating the SIF. Defendants relied on evidence setting forth the problems in computing premium-based assessments for self-insureds as justification for the change. Campbell's Aff.Pphs.13a-13x. Defendants concede that it was easy to assess insurers based on premiums. Campbell's Aff.Pphs.11j,13a. Campbell explained how the difficulty with calculating premiums-based assessment for self-insurers, resulting administrative costs, and the need for equitable funding of the SIF, required the change to benefits-based assessments. However, he does not indicate how the application of Act 188 to the benefits paid under the plaintiffs' pre-enactment contracts helped accomplish these

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[46] *See, Eastern Enterprises*, 118 S.Ct. at 2150-52; *Connelly*, 475 U.S. at 226, 106 S.Ct. at 1027.

goals.[47] These explanations do not provide any justification for the aspects of the law that result in the new liabilities imposed on the plaintiffs.

As applied to the plaintiffs, Act 188 placed a substantial economic burden on the plaintiffs that they had never before experienced in the 20-year operation of the SIF. Defendants have not advanced any explanation of how justice and fairness required the plaintiffs to abruptly begin paying an assessment to the state which they have no effective means to recover, as they could do for the previous 20 years. Plaintiffs' motion for summary judgment as to their claim under the Takings Clause should be granted.

Contract Clause Analysis

Plaintiffs contended that the application of Act 188 to their pre-Act 188 workers' compensation policies impaired two contractual relationships. First, the plaintiffs asserted that the law impaired the insurance contracts with their insureds. Second, the plaintiffs argued that Act 188 impaired their contractual relationship with the SIF. Each alleged contract must be addressed separately.

Plaintiffs' Contractual Relationship With SIF

The initial inquiry is whether there is a contractual relationship. Then the precise contractual right allegedly impaired must be identified.[48] Relying upon *United States Trust Co. v. New Jersey*,[49] and *Western National Mut. Ins. v. Lennes*, 46 F.3d 813,818 (8th Cir. 1995), the plaintiffs argued that the 1974 second injury fund statute created a contractual relationship. According to the plaintiffs, the second injury fund law gave rise to a contract and contractual rights because

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[47] Barth's Aff.Pphs.2-13.

[48] *General Motors, supra*; *Keystone Bituminous Coal, supra.*

[49] 431 U.S. 1, 97 S.Ct. 1505 (1977).

insurers were obligated to pay premium-based assessments and in return were guaranteed reimbursement of second injury claims. Plaintiffs asserted that this scheme is contractual in nature because it created privately enforceable reimbursement rights for insurers who paid assessments based on the premiums they collected. In Act 188 the state repudiated its contractual obligation by requiring the plaintiffs to pay a second assessment in order to obtain the same contractual benefit guaranteed by the payment of the first assessment.

Plaintiffs arguments are unpersuasive. The contractual relationship alleged by the plaintiffs is unlike the state-created statutory obligations recognized in *United States Trust* and *Western National*. In the latter case the state created a non-profit corporation with an operating plan setting forth the agreements between the corporation and the insurers that were required to be members. The operating plan required distribution of any excess premiums to the insurance companies. The reinsurance agreements between the corporation and the insurers carriers expressly incorporated the plan documents. Later the state legislature passed a law directly abrogating this part of the operating plan. Under the new law, the insurance companies had to refund the excess premiums they had already received to their policy holders, and any undistributed surplus would be distributed to insured employers rather than the insurers. The court found that the plan documents established an enforceable agreement. *Western National*, 46 F.3d at 818. *United States Trust* involved a bi-state legislative covenant promising security to bond purchasers using language expressly stating that the states were contracting with each other and the bondholders. *United States Trust*, 97 S.Ct. at 1511.

In this case there is no statutory covenant, or group of documents expressly incorporated into the plaintiffs' policies which set forth the obligations of the state, the insurance

companies and self-insurers. The state set up the SIF and an administrative-regulatory system to implement it. Plaintiffs consistently refer to the 1974 law as a guarantee or vested right. Yet, the plaintiffs do not explain how this legislation, in its language or history, gave rise to rights of this nature. When it made policy choices in 1974, the legislature did not enter into an agreement with the plaintiffs or other insurers, or promise that the second injury law would never change. The fact that the plaintiffs' policies generally incorporated the law in effect at the time they were issued does not transform the state law into a vested right.[50]

The Supreme Court addressed the question whether Congressional legislation gave rise to a contractual obligation in *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 105 S.Ct. 1441, 1451-52 (1985). Though the issue arose in the context of a Fifth Amendment due process challenge to the Rail Passenger Service Act of 1972 (RPSA), the Court analyzed the plaintiffs' claims with the same inquiry used in a Contract Clause challenge. The railroads claimed that the 1970 RPSA created a contractual right against the United States, and that the 1972 legislation impaired that right. *National Railroad Passenger Corporation*, 470 U.S. at 460-68, 105 S.Ct. at 1449-54. The Court noted that for many decades it has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy in effect until the legislature decides to change it. This well-

[50] It is undisputed that the plaintiffs' insurance contracts used the following standard language: "This insurance conforms to the parts of the workers compensation law that apply to . . . assessments payable by us under that law." Barth's Aff.Pph.48, Exhibit 5; affidavits of Hammer, Overgaard, Mibus, Goddard, Godfrey, Miller, Skow, and Solomon, with attachments.

established presumption is grounded in the elementary proposition that the primary function of a legislature "is not to make contracts, but to make laws that establish the policy of the state." "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.* at 1451.

The first step in determining whether a statute gives rise to a contractual obligation on the part of the state is to examine the language of the statute. 470 U.S. at 466, 105 S.Ct. at 1452. Plaintiffs have not pointed to any specific statutory language but referred generally to the paragraph which states that employers "shall be reimbursed from the Second Injury Fund," and the provisions of the statute that set up a system of notice, hearing and appeal of board decisions on claims for reimbursement.[51] It is clear from a review of this section, that the use of this mandatory language does not confer a right of or guarantee reimbursement. Employers or their insures must apply to the board which makes the final decision as to whether they have qualified for reimbursement. Examination of the second injury law enacted in 1974 includes no language evidencing an intent on the part of the state to guarantee premium-based assessments, or the right to reimbursement tied to payment of those assessments, or to bind itself in any way to a particular policy of assessment or reimbursement. If it can be said that the 1974 second injury law gave rise to any rights and obligations, those rights and obligations are entirely statutory in nature and not contractual. Plaintiffs' contention that Act 188 impaired their contractual relationship with the SIF in violation of the Contract Clause should be rejected.

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[51] La.R.S.23:1378, paragraphs A through E.

Plaintiffs' Contract With Their Insureds

There is no dispute that there existed contracts of insurance between the plaintiffs and their insureds. The question is whether any contractual rights of the parties to those contracts were impaired by Act 188. Plaintiffs primarily relied upon *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1978), and *Western National*. Plaintiffs argued that Act 188 substantially impaired their contracts written before the effective date of the act by upsetting their settled contractual expectations. Plaintiffs asserted that Act 188 substantially impaired their contracts by retroactively upsetting their reliance on existing law when they negotiated their premiums. This is so, plaintiffs maintained, because they could not have foreseen the change and are unable recover or mitigate the resulting losses.

A review of the Supreme Court's Contract Clause jurisprudence, and the cases relied on by the plaintiffs, establishes that Act 188 did not substantially impair the plaintiffs' pre-enactment contracts. The circumstances of this case are distinguishable from the facts in *Allied Structural Steel*, and are more analogous to those in *General Motors Corporation*. In *Allied*, the Court determined that the state legislation at issue directly adjusted and increased the existing obligations of the employer under the agreement, requiring payment of additional money to the other contracting party.[52] Act 188 did not force the plaintiffs to pay additional money or benefits to their insureds.[53]

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[52] Allied involved a state statute directed solely to employers who had voluntarily provided pensions to their employees. The employers were the sole contributors to the pension fund, and the state law substantially increased the companies monetary obligations to the fund, requiring it to recalculate its past 10 years of contributions based on a new vesting requirement. Allied, 98 S.Ct. at 2718-24.

[53] In *Allied* the Court noted that in passing the law, the Minnesota legislature was entering a field it had never before sought to regulate.

The present situation is more closely aligned with the facts and reasoning of *General Motors*. *General Motors* dealt with employment contracts, and legislation related to payment of workers' compensation benefits. The contracts contained no express provision concerning payment of workers' compensation benefits. Plaintiffs in that case argued that the state's workers' compensation law was an implied bargained-for term of the contracts. After they paid benefits for a certain period the transaction was completed. Plaintiffs asserted that a subsequently enacted state law could not upset their settled contractual expectations based on these implied contractual terms. In finding that state law did not impair any contractual agreement between the parties, the Court noted that the challenged legislation did not change or affect the legal enforceability of the employment contracts, nor the parties' rights to enforce the bargained-for terms of their contracts.

Plaintiffs here are also attempting to rely upon the affect of Act 188 on implied terms of their pre-existing contracts. The standard policy language used by the plaintiffs did not expressly cite the 1974 second injury fund law, nor expressly state that the insurers had the right under the contract to pass through the costs of any SIF assessments associated with the contract to the insured. While the affect of Act 188 might prevent the plaintiffs from passing on the cost of the new assessments through their contracts, it did not expressly repeal, increase or otherwise change any of the bargained-for obligations of the parties, nor affect the legal enforceability of the policies. Contrary to the plaintiffs' arguments, the SIF assessments do not arise out the contracts, but arise from state law. Act 188 established a new method of assessment that imposed a new cost on the plaintiffs that they could not effectively recoup under their pre-existing contracts.

Allied, 438 U.S. at 249, 98 S.Ct. at 2725. In enacting Act 188 the state was legislating in an area long subject to regulation.

Although the change in law created an unexpected cost for the plaintiffs, the cost was imposed on insurers directly, not on their contracts. Act 188 did not impair the plaintiffs' contractual obligations with their insureds. Plaintiffs' motion for summary judgment on their Contract Clause claim should be denied and the defendants' motion granted.

Equal Protection Clause Analysis

Defendants moved for summary judgment in their favor as to the plaintiffs' claim that the application of Act 188 to insurers that have ceased or substantially reduced their Louisiana underwriting violates the Equal Protection Clause. Defendants maintained that under the rational basis test Act 188 represents a rational means of furthering a legitimate state interest. Plaintiffs argued that the defendants are not entitled to summary judgment because the evidence shows that the purpose behind Act 188 was not legitimate, but rather an attempt by the state to favor Louisiana employers and the state-created workers' compensation insurer, and create barriers to insurers exiting the Louisiana market.

Plaintiffs pointed out that Campbell's affidavit does not explain why the new law was specifically applied to withdrawing insurers. Plaintiffs also noted that none of the information in Campbell's affidavit was stated before the legislative committee. According to the plaintiffs, this shows the state's illegitimate purpose; the testimony establishes the protectionist motive behind the law.

Campbell's affidavit stated the reasons for the 1995 changes in the second injury laws.[54] Those reasons primarily were creation of more equitable funding and reduction of administrative costs. The rational basis test does not require that the purpose behind the law be stated before or at the time

[54] Campbell's Aff. Pphs. lla-11j,13a-13x,14,21,24,26,27,28.

the legislation is passed.[55] Furthermore, nothing in Barth's affidavit or testimony at the committee hearing contradicts the explanation for the changes in the law set forth by Campbell, or calls into question the legitimacy of these reasons. The committee testimony arguably referred to only one aspect of the law and did not explain the purpose behind the entire statute.[56] Moreover, accepting this testimony as true, it was not irrational or unreasonable for state officials to believe that the new law would reduce administrative costs by allowing the state to continue to assess insurers who were no longer collecting premiums in the state but still applying to the SIF for reimbursement. The money in the SIF is not only used for reimbursement, but also to pay the administrative costs of the Board.

As stated by the defendants, Act 188 treats all policies, and all insurers and self-insureds who are paying workers' compensation benefits, the same. Plaintiffs, in effect, argued that Act 188 violates the Equal Protection Clause because it should have treated them differently but did not do so. Plaintiffs have failed to establish a genuine dispute for trial on the essential elements of their Equal Protection Clause claim. Defendants' motion for summary judgment on this claim should be granted.

Recommendation

It is the recommendation of the magistrate judge that: (1) the defendants' motion for summary judgment on the

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[55] Under the rational basis test rational distinctions "may be made with substantially less than mathematical exactitude." *City of New Orleans, supra.* The rational basis test does not demand that a legislature or official decision-maker actually articulate at any time the purpose or rationale supporting the classification. It only requires that a proffered purpose may conceivably or reasonably have been the purpose. *Nordlinger, supra.*

[56] The testimony is Exhibit 6 attached to Barth's affidavit. Though the record contains some dispute as to what official spoke to the committee, there is no dispute as to the contents of the statement.

plaintiffs' claim under the Takings Clause be denied, and that the plaintiffs' motion be granted, (2) the defendants' motion for summary judgment on the plaintiffs' claim under the Contract Clause be granted, and that the plaintiffs' motion be denied, and (3) the defendants' motion for summary judgment on the plaintiffs' claim under the Equal Protection Clause be granted, and that the plaintiffs' motion be denied.

To effectuate the foregoing recommendations, it is further recommended that the court: (1) declare Act 188 of the 1995 Louisiana legislature to be in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, insofar as Act 188 imposed or permitted the Second Injury Board to impose on the plaintiffs Second Injury Fund assessments based wholly or partially on benefits paid by the plaintiffs under policies of workers' compensation insurance issued prior to June 12, 1995; and (2) enjoin the defendants from imposing on the plaintiffs Second Injury Fund assessments based wholly or partially on benefits paid by the plaintiffs under policies of workers' compensation insurance issued prior to June 12, 1995.

Baton Rouge, Louisiana, July 29, 1998.

/s/ Stephen Reidlinger
STEPHEN REIDLINGER
UNITED STATES MAGISTRATE JUDGE